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No. [redacted]72

TOMAS GARROZI, JUANA MARIA GONZALEZ AND DOMINGO PIAZZI,

Appellants,

vs.

JUANA DASTAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF ON BEHALF OF APPELLANTS.

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EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

NUMBER 327.

TOMÁS GARROZI, *et al*,
Appellants,

vs.

JUANA DASTAS,
Respondent.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a final decree and order made by the District Court of the United States for Porto Rico. This suit was commenced in the Insular District Court of the District of Ponce by the complainant, while she was still the wife of one of the defendants, to wit: Tomás Garrozi, by a Bill of Complaint filed in that Court (Record, p. 1). On separate petitions of each one of the defendants (Record, pp. 14, 20 and 21) the case was removed to the United States District Court for Porto Rico. A motion to remand was made and denied by the Court (Record, p. 18). Thereupon the complainant filed reformed Bill of Complaint on the equity side of the United States District Court, adding one

more defendant to wit: Quintin Ramirez, who afterwards was dismissed from the case (Record, p. 28).

The demurrer of the defendants, based on the ground that a married woman cannot sue in her own name, was cured by an amendment to the Bill of Complaint (Record, p. 34). The plea of the defendants that a woman while still married cannot sue her husband for the liquidation of the marriage community (Record, p. 31) was overruled by the Court (Record, p. 39). After the answer of the defendants came in, a further amendment to the Bill of Complaint was allowed by the Court to be filed (Record, p. 36). Thereupon an answer to the amended Bill was filed (Record, p. 30). And afterwards an amendment to this answer (Record, p. 42). A general replication was then filed by the complainant (Record, p. 38), issue joined and testimony taken before an Examiner and the case referred to a Special Master.

When the case was ready for final hearing before the Special Master an amended Bill of Complaint was allowed by the Court to be filed (Record, p. 60). A plea thereto was filed (Record, p. 65), and overruled. A second plea was then filed (Record, p. 68). And an answer was then filed (Record, p. 69). Thereupon upon a motion to strike pleas and answer, the second plea has been ruled to stand as a part of the answer. A replication was then filed to the answer (Record, p. 76). After the issues have thus been joined for a second time, then upon some further testimony, in addition to the former, having been taken before the Examiner and upon the reference of the whole case to the Special Master for decision, a second hearing was had before him, and thereupon the Special Master filed his report (Record, p. 78). Exceptions were filed to the Master's Report by the complainant (Record, p. 85), and by the defendants (Record, p. 86). Upon the hearing of the exceptions the Court confirmed the Master's Report, and entered a decree in the case (Record, p. 89) and on the next day a supplemental order to the

said decree (Record, p. 92). A statement of the findings of fact and of the exceptions to the testimony was certified, by the Court (Record, p. 108). The assignment of errors was filed at the taking of the appeal (Record, p. 95).

The bill alleges that one of the defendants, to wit: Tomás Garrozi, the husband of the complainant, has made several fraudulent transfers of his property to the other defendants named in the Bill of Complaint, in order to deprive the complainant of her share in the assets of the marriage community property, and prays for the annullment of the deeds and for the liquidation of the marriage community property. The defenses relied on in the plea and answer to the last amended bill of complaint were: FIRST, that the complainant having been divorced for her adultery has lost all right to any share of the marriage community property assets; SECOND, that for the same reason she has lost all right to the administration of any of her property; THIRD, that there were no profits of the marriage community property, this property being at the time of the divorce worth less than at the time of the marriage and that the complainant never had contributed any property to the marriage community, and fourth and lastly, that all the transfers of the property between the defendants complained of in the bill of complaint were made in good faith and for a good and valuable consideration.

Specification of Errors.

The following, among other, were alleged as errors in the Court below (enumerated by the numbers in the assignment of errors):

XLI.

The Court erred in taking jurisdiction of this suit by removal from an Insular Court of Porto Rico, to

wit, the District Court of Ponce, because this United States District Court for Porto Rico has no jurisdiction in this case and no power to remove it, as one of the parties defendant, to wit: Juana María Gonzales is a citizen of Porto Rico and the controversy by its nature is not a separable controversy, the allegations of the complaint being that a joint fraud was committed by all the three defendants together against the complainant, and also on the ground that a separable controversy can only be removed to the United States Court when a suit is pending between citizens of different States and not between aliens.

V.

That the said Court erred in overruling the demurrer of the defendants to the bill of complaint, as the bill of complaint was filed while the complainant was still the legal wife of the defendant Tomás Garrozi and she then had no right in law to sue for a division of the marriage community assets.

VI.

That the said Court erred in allowing complainant to file an amendment to her bill of complaint, alleging that she was divorced after the divorce was granted her husband on the ground of her adultery, because that is a matter of a supplemental bill and not of an amendment.

VII.

That the said Court erred in allowing another amended bill of complaint to be filed after the case was ready for final hearing and evidence had been taken, and putting in such amended bill of complaint matters which occurred after filing of the original bill of complaint, because such matters are subject for a supplemental bill and not for an amended bill of complaint.

XLIX.

That the said Court erred in overruling the exception of defendants to the fourth conclusion of law of the Master's report, finding that the complainant is entitled to the sum of thirteen thousand seven hundred and fifty dollars. The exception is founded on the following grounds:

1. That the evidence does not show any profits of the marriage society partnership at all, and

2. Because there is wrongfully charged against the defendant Garrozi the sum of twenty-two thousand dollars, which he has spent many years ago for the purpose of curing himself of a grave and dangerous disease, such expense being a necessary expense and not made with any fraudulent intent, and therefore the charge thereof against him in the marriage society partnership liquidation is not warranted either by law or in equity.

L.

That the said Court erred in overruling the exception of the defendants to the fifth conclusion of law, that complainant has a right to terminate the control of the defendant Garrozi over such interest in the marriage society property as the complainant may have, as not warranted either by the facts of the case or by the law.

LI.

That the said Court erred in overruling the exception of the defendants to the sixth conclusion of law, finding the conveyances described in findings of fact numbered from eighteen to twenty-two inclusive should be decreed to be null and void and that a decree be entered in conformity thereto, on the ground that such findings and conclusions of law are not warranted either by the facts proven in this case or by the law.

LII.

That the said Court erred in overruling the exception of the defendants to the refusal of the Master to find as a conclusion of law, as requested by the defendants, that the complainant is not entitled to any share in any marriage society property on the ground of her adultery and the decree of divorce granted therefor to the defendant Garrozi.

LIII.

That the said Court erred in overruling the exception of defendants to the refusal of the Master to find as a conclusion of law, as requested by defendants, that the husband always remains the administrator of any property of his wife, including the marriage society assets, in case a divorce be granted to him on the ground of her adultery.

LV.

That the said Court erred in overruling the exception of defendants to the refusal of the Master to find as a conclusion of law, as requested by the defendants, that no fraud will be presumed, and that unless there is proof of fraud transactions between parties will be considered as made in good faith.

III.

That the said Court erred in entering a decree for a certain specified sum of money, to wit, thirteen thousand seven hundred and fifty dollars, while under the law upon the liquidation of the marriage community property only an aliquot part may be assigned to the spouses in what remains after having deducted the capital brought by each one of them to the marriage.

IV.

That the said Court erred in allowing alimony, suit money and counsel's fees in a case which, under

the amendment of the bill, is brought by a woman who has already been divorced from her husband on account of her adultery and is no more under his *patria potestas.*

IX.

That the said Court erred in decreeing and ordering that the complainant should recover alimony which she was granted *pendente lite* during the application for divorce by her husband by another Court and which was not the subject matter of this suit at all.

XI.

That the said Court erred in allowing fifteen hundred dollars as counsel fee to complainant's counsel in a suit which, under the amended bill of complaint, she instituted, being already a divorced woman and not a married woman or under the *patria potestas* of her husband.

XII.

That the said Court erred in sustaining the objection of the complainant to the question by defendants' counsel on cross-examination, which was as follows: "So then it was not by judging the amount of the crop that you gave the value and it was not by the extent of the land? Your estimate, then, was based simply on what other people said?", to which ruling the defendants excepted.

XIII.

That the said Court erred in not granting the motion of the defendants to strike out all the testimony of the witness Juan Macini Pietri referring to the plantations "Leonor" and "Luisa," as being simply hearsay, after the witness had given the following answers to defendants' questions: Q. "You have testified something about the plantations

'Luisa' and 'Leonor.' What do you know about those farms?" Ans. "I have testified that the plantation 'Luisa' produces a yearly average of 500 quintals, and the plantation 'Leonor' about 300 quintals." Q. "How do you know that? Have you been managing these plantations?" Ans. "I know it by what is said." Q. "That is all you know about it?" Ans. "Yes." To which ruling the defendants excepted.

XIV.

That the said Court erred in overruling defendants' objection to the question by complainant's counsel as follows: "What is the value of the plantation 'Luisa' and 'Hortencia' to-day (1904)?" on the ground that it is too remote in time, the divorce having been granted in 1902 and liquidation, under the law, must be made as of the date of the divorce, to which the defendants excepted.

XV.

That the said Court erred in overruling the objection of defendants to the question: "What was the value of the plantation 'Juanita' before he was married in 1886?" on the ground that the witness testifying had not qualified as an expert, to which defendants excepted.

XVI.

That the said Court erred in overruling the objection of defendants to the question: "How wealthy is he to-day?" (meaning Garrozi), on the ground that it calls for an opinion; and that the Court erred in overruling the motion to strike the answer to the same question as an opinion, to which the defendants excepted.

XVII.

That the said Court erred in sustaining the objection to defendants' question on cross-examination,

as follows: "When you said that the 'Luisa' belongs to Tomás Garrozi, are you willing to swear that it is registered in his name?" to which ruling defendants excepted.

XVIII.

That the said Court erred in overruling the objection of defendants to the question of complainants: "What was this plantation worth before his marriage?" on the ground that the witness Gustavo Nin had not qualified as an expert, to which ruling the defendants excepted.

XIX.

That the said Court erred in overruling the defendants' motion to strike out this witness Nin's testimony as to valuation after he gave to the question: "You base your calculation on the price you heard Mr. Pintado paid for it, do you?" the following answer: "Yes. He gave it to Pintado in liquidation for 45,000 pesos," to which ruling the defendants excepted.

XX.

That the said Court erred in overruling the defendants' objection to the question asked of witness Manuel Catalá Dueña by the complainant, to wit, "What was the valuation of the plantation 'Juanita' from the year 1881 to 1885?" on the ground that the witness had not qualified as an expert, to which ruling the defendants excepted.

XXI.

That the said Court erred in overruling the objection of the defendants to complainants' question put to the same witness, to wit, "What was the value of the plantation 'Juanita' in cash at that time?" on the ground that the witness had not qualified as an expert, to which ruling the defendants excepted.

XXII.

That the said Court erred in overruling the objection of defendants to complainant's question put to the same witness, to wit, "What was the value of the cock-pit?", to which ruling the defendants excepted.

XXIII.

That the said Court erred in overruling the defendants' objection to complainant's question put to the same witness, to wit, "What was the value of the other wooden house that he had?", also on the ground that the witness had not qualified as an expert, to which ruling the defendants excepted.

XXIV.

That the said Court erred in overruling the objection of defendants to complainants' question put to the same witness, to wit, "What was the value of the two other masonry houses?", on the ground that the witness had not qualified as an expert, to which ruling the defendants excepted.

XXV.

That the said Court erred in overruling the objection of defendants to complainant's question put to the same witness, to wit, "What was the value of the other property he had?" (meaning Garrozi), to which ruling the defendants excepted.

XXVI.

That the said Court erred in overruling the motion of defendants to strike out the answer of the same witness to the question of the complainant, "How much money in cash? (meaning Garrozi). Ans. "As proceeding from the 'Juanita', he should have $28,000", on the ground that this is a personal

opinion of the witness, to which ruling the defendants excepted.

XXVII.

That the said Court erred in overruling the objection of the defendants to complainant's question, to wit, "What is the title of the collection entered in 1897"; also in overruling the objection of defendants to the questions of complainant: "What other collections were made in that year?"; "Of what items is this collection of 6,000 made up?"; "What is the character of that entry of 6,000 pesos?"; "Please refer to the other collection of 1,000 pesos.", on the ground that they are all too remote from the time, either of the marriage or of the divorce, to which ruling the defendants excepted.

XXVIII.

That the said Court erred in overruling the objection of defendants to the questions of complainant, to wit: "Referring to the year 1898, what amount did you credit Garrozi?" "What payments did you make to Garrozi in the year 1898?" "And what amounts of money have you taken in or collected for him?" "And in 1889 what collection did you make?" as being too remote in time from either the marriage or the divorce, to which ruling the defendants excepted.

XXIX.

That the said Court erred in overruling the objection of the defendants to the question of complainant, to wit, "What is the title of the amounts credited by you to Garrozi in 1903?", on the ground that it was too remote and after the divorce was granted; and also to the question of complainant, "What amount did he take in provisions in 1903?", on the

same ground, to which rulings the defendants excepted.

XXX.

That the said Court erred in overruling the objection of defendants to the question, "What was the value of the hacienda 'Juanita' in the year 1880?"; and also to the question, "How many quintals did the hacienda 'Juanita' produce about the year 1880 and from then to 1886?", to which rulings the defendants excepted.

XXXI.

That the said Court erred in overruling the objection of defendants to the question, "Has Tomás Garrozi increased his wealth since his marriage in 1886?", on the ground that it calls for an opinion of the witness, to which ruling the defendants excepted.

XXXVI.

That the said Court erred in sustaining the objection of the complainant to defendants' question put to the witness, Francisco Paoli, as follows: "Were you present in the year 1886 at any such inventory?" (referring to inventory made by Garrozi of his property at the time of his marriage), to which ruling defendants excepted.

XXXVII.

That the said Court erred in sustaining the motion of complainant to strike out the answer to the following question: "Did you count the money?", which answer was: "No, sir, Luis Garcia counted it; they made a note of it and it amounted to 80,000 pesos." And also the following answer to the question: "So what you know about that amount is

what you have heard Garrozi say about it, is it?", which answer was: "Yes, and I also saw the money on the table, and as they counted it I heard them and they stated the amounts until they reached the sum of 80,000 pesos, and it was in gold money", to which ruling the defendants excepted.

XXXVIII.

That the said Court erred in granting the motion of complainant to strike out the testimony of this witness Francisco Paoli, except as to persons present, to which ruling the defendants excepted.

XXXIX.

That the said Court erred in granting the motion to strike out the testimony of this witness Paoli or his answers to the two following questions: Q. "Did you see the whole inventory?" Ans. "I saw when the inventory amounted to some 200,000 pesos and then I retired." Q. "How did you know it was for that sum?" Ans. "Because I heard them saying '80,000 dollars in gold; 90,000 dollars in property; various mortgages and other credits", to which ruling the defendants excepted.

The argument in support of these several assignments of error with reference to the testimony and the ruling of the Court and the proceedings appears in the following points. The errors on the testimony and the rulings of the Court thereon grouped under the numbers 12 to 31 and 36 to 39 will be treated together in argument in one point on account of their similarity and to avoid multiplicity of argument.

POINTS.

FIRST POINT.

This Court has jurisdiction of this case on appeal.

SECTION 35 of the Act establishing the Government of Porto Rico (Act of April 12, 1900, Chap. 191, 31 St., 85) contains the following:

"SECTION 35. That writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the Territories of the United States, and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied."

SECTION 702 of the Revised Statutes provides as follows:

"SEC. 702. The final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witness, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court."

SECTION 1 of the Act of March the 3d, 1885, Chap. 355, says as follows:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit

at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

Construing these statutes in connection with the Act of 1889 establishing Circuit Courts of Appeals, this Court has decided that appeals may be taken from judgments or decrees of the United States District Court of Porto Rico, to the Supreme Court of the United States in all civil cases where the amount involved is more than five thousand dollars.

Royal Insurance Co. *vs.* Ruperto Martin, 192 U. S., 150.

SECOND POINT.

The United States District Court for Porto Rico had no jurisdiction to hear, try or determine this case and its decree must be annulled for want of jurisdiction.

(*A.*)

It has been repeatedly held that the Supreme Court will reverse the judgment of the lower Court in case that Court had no jurisdiction in a case removed to it from a State court, although it was the party appellant that had petitioned for the removal. It has been held that it is the duty of the Supreme Court even of its own motion to note critically the record upon which a case comes before it in order to test the jurisdiction of the Court below.

We quote the language of Justice Matthews in the case of Mansfield, C. & L. M. Ry. Co. and another *v.* Swan and others, 111 U. S., 379:

"On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of

this Court, and then of the Court from which the record comes. This question the Court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it. This rule was adopted in Capron *v.* Van Noorden, 2 Cranch, 126, decided in 1804, where a judgment was reversed on the application of the party against whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he had invoked. This case was cited with approval by Chief Justice Marshall in Brown *v.* Keene, 8 Pet., 112.

In Jackson *v.* Ashton, 8 Pet., 148, the Court itself raised and insisted on the point of jurisdiction in the Circuit Court; and in that case it was expressly ruled that because it did not appear that the Circuit Court had jurisdiction, this Court, on appeal, had no jurisdiction except for the purpose of reversing the decree appealed from on that ground. And in the most recent utterance of this Court upon the point in Bors *v.* Preston, *ante*, 407, it was said by Mr. Justice Harlan: "In cases of which the circuit courts may take cognizance only by reason of the citizenship of the parties, this Court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits, on appeal of writ of error, where the record does not affirmatively show jurisdiction in the Court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption is, in every stage of the cause, that it is without their jurisdiction unless the contrary appears from the record." The reason of the rule, and the necessity of its application, are stronger and more obvious when, as in the present case, the failure of the jurisdiction of the Circuit Court arises, not merely because the record omits the averments necessary to its existence, but because it recites facts which contradict it.

In the Dred Scott case, 19 How., 393–400, it was decided that a judgment of the Circuit Court upon

the sufficiency of a plea in abatement, denying its jurisdiction, was open for review upon a writ of error sued out by the party in whose favor the plea had been overruled. And in this view Mr. Justice Curtis, in his dissenting opinion, concurred; and we adopt from the opinion the following statement of the law on the point: "It is true," he said (19 How., 566), "as a general rule, that the Court will not allow a party to rely on anything as cause for reversing a judgment which was for his advantage. In this we follow an ancient rule of common law. But so careful was that law of the preservation of the course of its courts that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the Court itself from its settled course of procedure. The cases on this subject are collected in Bac. Abr. "Error," H, 4. And this Court followed this practice in Capron *v.* Van Noorden, 2 Cranch, 126, where the plaintiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction. But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is not what either of the parties may be allowed to do, but whether this Court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the Court is when no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even when it does not appear, affirmatively, that it does exist (Pequingnot *v.* Pennsylvania R. Co., 16 How., 104). It acts upon the principle that the judicial power of the United States must not be exerted in a

case to which it does not extend, even if both parties desire to have it exerted (Cutler *v.* Rae, 7 How., 729). I consider, therefore, that when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this Court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that either the Circuit Court nor this Court shall use the judicial power of the United States in a case to which the Constitution and Laws of the United States have not extended that power."

Capron *v.* Van Noorden, 2 Cranch, 126.
Brown *v.* Keene, 8 Pit., 112.
Jackson *v.* Ashton, 8 Pit., 148.
Bors *v.* Preston, 111 U. S., 252.
Dred Scott case, 19 How., 393–400.
Pequingnot *v.* Pennsylvania R. Co., 16 How., 104.
Cutler *v.* Rae, 7 How., 729.
Continental Insurance Co. *v.* Roades, 119 U. S., 237.
Torrens *v.* Sredd, 144 U. S., 533.
Hanrick *v.* Hanrick, 153 U. S., 192–198.
Neal *v.* Pa. Co., 157 U. S., 153.

(*B.*)

To entitle a party to removal of a cause to a United States Court, it must appear affirmatively upon the record that at the time of the commencement of the suit in the State Court and also at the time of the petition for removal the parties plaintiff or defendant had the divers citizenship and residence required by the statutes giving the right to remove. In the case at bar it appears from the original complaint filed in the District Court of Ponce (Record, p. 1) that the parties defendant were all of them residents of Porto Rico at the time of the commencement of the suit, and although it was denied by one of the defendants, it was admitted by the defendant Juana María Gonzalez, that she was

a resident of Porto Rico as well as a citizen of Porto Rico. It is also disclosed in the petition for removal by Juana María Gonzalez that she is a citizen and also a resident of Porto Rico and that she was such at the time of the filing of the petition for removal as well as at the commencement of the suit in the local court (Record, p. 20). The case could, therefore, not be removed to the United States District Court under the requirements of the statutes. To entitle a party to a removal the jurisdiction of the United States Court must appear affirmatively and unequivocally.

Mansfield, C. & L. M. Ry. Co. *v.* Swan, 111 U. S., 379.
Gibson *v.* Broce, 108 U. S., 561.
Grace *v.* American Cent. Ins. Co., 109 U. S., 278-283.
Robertson *v.* Cease, 97 U. S., 646.
New Orleans *v.* Winter, 1 Wheat., 91.
Williams *v.* Nottawa, 104 U. S., 209.

A defect, to show positively the requisite diverse citizenship of each party at the time of the commencement of the suit, cannot be cured by amendment of the bill.

In Stevens *v.* Nichols, 130 U. S., 230, Mr. Justice Harlan says:

"In cases where jurisdiction depends upon the citizenship of the parties such citizenship or the facts which in legal intendment constitute it should be distinctly and positively averred in the pleadings or they should appear affirmatively and with equal distinctness in other parts of the record."

In Crehore *v.* Ohio and M. Ry. Co., 131 U. S., 240, Mr. Justice Harlan, who delivered the opinion of the Court, says:

"All this is made entirely clear by the express requirements of the Act of 1875 that the Circuit Court shall remand to the Court from which it was re-

moved any cause brought from that Court, whenever it appears that it is not one of which the Federal Court can properly take cognizance (Cameron *v.* Hodges, 127 U. S., 322, 326). If a suit entered upon the docket of a Circuit Court as removed upon the ground of the diverse citizenship of the parties was never in law removed from the said Court, no amendment of the record made in the former could affect the jurisdiction of the latter or put the case rightfully on the docket of the Circuit Court as of the date when it was there docketed; for the only mode provided in the Act of Congress by which the jurisdiction of the State court of a controversy between citizens of different States can be divested is by presenting a petition and bond in that court showing in connection with the record a case that is removable."

Mr. Chief Justice Fuller in Jackson *v.* Allen, 132 U. S., 27, says as follows:

"It appears on the record that the citizenship of the parties at the commencement of the actions as well as at the time the petitions for removal were filed was not sufficiently shown, and that therefore the jurisdiction of the State court was never divested (Stevens *v.* Nichols, 130 U. S., 230). This being so, the defect cannot be cured by amendment."

In Graves *v.* Corbin, 132 U. S., 571, Mr. Justice Blatchford says as follows:

"Under the provisions of Section 5 of the Act of March 3, 1875, that if in any suit removed from a State court to a Circuit Court of the United States it shall appear to the satisfaction of said Circuit Court at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the Court

from which it was removed as justice may require, this Court has held that when it appears to this Court that the case is one of which under that provision the Circuit Court should not have taken jurisdiction, it is the duty of this Court to reverse any judgment given below and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. Williams *v.* Nottawa, 104 U. S., 209. This rule has been recognized by this Court, to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that Court or in this Court, in Turner *v.* Trust Co., 106 U. S., 552-555; Railroad Co. *v.* Swan, 111 U. S., 379-386; Farmington *v.* Pillsbury, 114 U. S., 138-144; and Bridge Co. *v.* Ottoe Co., 120 U. S., 225-226. In Stevens v. Nicholls, 130 U. S., 230, it was held that, if a proper diversity of citizenship does not appear by the record to have existed both at the commencement of the suit and at the time of filing the petition for removal, this Court will remand the cause to the Circuit Court with directions to send it back to the State Court with costs against the party at whose instance the removal was made. This same principle was asserted in Crehore *v.* Railroad Co., 131 U. S., 240, where it was also held that where a suit is entered upon the docket of a Circuit Court as removed on the ground of the diverse citizenship of the parties, and was never in law removed, no amendment of the record made in the Circuit Court can affect the jurisdiction of the State Court, or put the case rightfully on the docket of the Circuit Court as of the date when it was so docketed."

(*C.*)

As it appears from the complaint filed in the Insular District Court (Record, p. 1) and specially from the petition of removal by Juana María Gonzalez (Record, p. 20), the complainant in this case

at the time of the filing and commencement of the suit was an alien and so were two of the defendants, but the third defendant, to wit, Juana María Gonzalez, was a citizen and a resident of Porto Rico. Now there are two theories only upon which a removal under these circumstances could be had; either under the second or under the third subdivision of Section 2 of the Act of March 3, 1887, as amended by the Act of August 13, 1888 (Supplement Two, Revised Statutes, Volume 2, Chapter 866, page 611). This act was made applicable to the courts of Porto Rico by Section 34 of the Act of April 12, 1900, called the Foraker law, which says: "The laws of the United States relating to appeals, writs of error and certiorari, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district courts of the United States and the courts of Porto Rico."

Now if the removal was under the second subdivision, then it is clear that the defendants, in order to be entitled to a removal must be non-residents, and upon the face of the petition of Juana María Gonzalez, as well as upon the face of the original complaint filed in the Insular Court, it appears that she was at that time a resident also and not only a citizen of Porto Rico.

It has been held by this Court that all the defendants must be non-residents.

Martin *v.* Snyder, 148 U. S., 663.

It has been invariably so held in innumerable cases in all the courts of the United States. It is also clear that all the defendants in order to be entitled to a removal must be non-residents from comparison of the language in the second, third and fourth subdivisions of Section 2 of said act. In the second subdivision the words are, "By the defendant or defendants therein, being non-residents of that State." The words of the third subdivision are

as follows: "Either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." In the fourth subdivision the following words are used: "Any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper district." It is clear and evident from the different language used in the quoted subdivisions that when Congress wanted to give the right of removal to any one of the defendants in case there are more than one defendant, it expressly said so in unequivocal language, and in subdivision two Congress intentionally omitted those words which it had used in subdivisions three and four.

In Parkinson *v.* Barr, 105 Fed. Rep., 81-83, it was held that "under the statute it is clear that in all cases where there is no separable controversy the right of removal can be exercised only by non-resident defendants," and it was further held in that case that "the law is well settled that suits between citizens of a State and foreign States, citizens of subjects can be removed only when the defendants are all non-residents of the State where the suit is brought."

Cudahy *v.* McGeoch (C. C.), 37 Fed. 1.
Walker *v.* O'Neill (C. C.), 38 Fed., 374.
Scott *v.* Cattle Co. (C. C.), 41 Fed., 225-227.
Purcel *v.* Mortgage Co. (C. C.), 42 Fed., 465.
Tracy *v.* Morel (C. C.), 88 Fed., 801.

If the removal right is urged upon the basis of the third subdivision of Section 2 of said act, that is to say, on the ground of a separable controversy, then the case at bar is not removable, because that clause in the third subdivision speaks only of cases pending between citizens of different States. And it was uniformly held that only citizens of any of the States can take advantage of that clause. Even

a State cannot take advantage of it, and aliens surely not.

Arkansas *v.* Kansas, 183 U. S., 185.
Stone *v.* State of Carolina, 117 U. S., 430.
Merchant Co. *v.* Insurance Co., 151 U. S., 368.
Postal Tel. Co. *v.* Alabama, 155 U. S. 482.
King *v.* Cornel, 106 U. S., 395.

It was also held that in removals on the ground of a separable controversy all the parties on one side must differ in citizenship from all the parties on the other side. In the case at bar the complainant is a citizen of France, an alien, and so are two of the defendants, but the third defendant, to wit: Juana Maria Gonzalez, is a citizen of Porto Rico.

Removal Cases, 100 U. S., 457.
Blake *v.* McKim, 103 U. S., 336.

Besides, it appears from the examination of the allegations of the complaint as well as of the whole record, that there was no separable controversy, as conspiracy between all the defendants to defraud the complainant was charged and the annullment of deeds between the three defendants was prayed for, and no judgment separately could be given in the case, which would not affect all the defendants alike. It was held that in conspiracy cases defendant cannot remove on separate counts.

Little *v.* Giles, 118 U. S., 596.
Louisville & R. Co. *v.* Ide, 114 U. S., 52.
Farmington *v.* Pillsbury, 114 U. S., 138.
Pirie *v.* Tvedt, 115 U. S., 41.
Crump *v.* Thurber, 115 U. S., 56.
Starin *v.* New York, 115 U. S., 248.
Sloane *v.* Andeson, 117 U. S., 278.
Insurance Co. *v.* Huntington, 117 U. S., 280.
Core *v.* Vinal, 117 U. S., 347.
Mining Co. *v.* Canal Co., 118 U. S., 264.
Hyde *v.* Rubble, 104 U. S., 407.
Ayres *v.* Wiswall, 112 U. S., 187-192.

THIRD POINT.

A married woman as long as the marriage has not been terminated by divorce or death has no right to demand the liquidation of the marriage community property.

The law is so clear about it that we need only cite the sections of the Civil Code referring thereto. (The Civil Code referred to is the one in force at the time of the divorce, that is to say, the Civil Code for Cuba and Porto Rico, translated into English by the War Department in 1900.)

Article 1417 of that Civil Code reads as follows: "The conjugal partnership expires on the dissolution of the marriage or when it is declared void. The spouse who, by reason of his or her bad faith, caused the annulment, shall not receive any share of the property of the partnership. The conjugal partnership shall also terminate in the cases mentioned in Article 1433."

Article 1433 reads as follows: "The husband and wife may request the separation of the property, and it shall be decreed, whenever the spouse of the plaintiff should have been condemned to a penalty which includes civil interdiction, or should have been declared an absentee, or should have given cause for divorce. In order that the separation may be decreed, it shall be sufficient to present the final judgment rendered against the guilty or absent spouse in each one of the three cases above mentioned."

As on account of the defendant Garrozi, the husband of the complainant, being a Frenchman by nationality, although she is a Porto Rican, and their marriage and divorce took place in Porto Rico, and their residence was in Porto Rico during the whole time of their marriage, there may be claimed that

the French law shall govern in this case, we will show in each point argued that the French law is identical with the law of Porto Rico in all respects as far as the marriage community is concerned, as both the French and Spanish Civil Codes are expositions of the same system. As far as the law argued in this point is concerned, we quote the French Civil Code, Article 1441, which says: "La communaute se dissout, 1_e, par la mort naturelle; 2_e, par la mort civile; 3_e, par la divorce; 4_e, par la separation de corps; 5_e, par la separation de biens."

Translated into English: "The community is dissolved, 1st, by natural death; 2d, by civil death; 3d, by divorce; 4th, by separation of the bodies; 5th, by separation of the goods."

Of course, the separation spoken of means judicially decreed, as in case of a separation by mutual consent the law would certainly leave it to the spouses themselves to stipulate about the community property.

The Court below therefore erred in overruling the defendants' plea and in not dismissing the case. It is true the bill of complaint has been amended after the answer came in, alleging that subsequently to the filing of the bill and answer the complainant has been divorced from her husband Tomás Garozzi, one of the defendants; but the rule is that matters which happen after the suit has commenced cannot be brought in by amendment, and can only come in by a supplemental bill.

We quote from Beach, Modern Equity Practice, Section 155: "As a general rule a bill cannot be amended for the purpose of stating in it new matters which have occurred subsequent to the commencement of the suit. A bill insufficient in itself is not aided by an amendment stating facts which may or may not be subsequent in time to the filing of the bill." "Where a feme sole who should have been made a defendant marries after the commencement of the suit against the other defendants, she cannot be brought before the Court with her hus-

band by an amendment of the original bill, but a supplementary bill is necessary."

Citing:

Clark *v.* Hall, 7, pp. 386-403; Mason *v.* Hartford, &c. R. Co., 10 Fed. Rep., 334; Bannon *v.* Comegys, 69 Md., 411; Killinger *v.* Hartman, 21 Neb., 297; Lyster *v.* Stickney, 12 Fed. Rep., 609; Copen *v.* Flesher, 1 Bond, 440; Keyser *v.* Renner's Admr., 87 Va., 249; Campbell *v.* Browne, 5 Paige, 34; Nichols *v.* Rogers, 139 Mass., 146.

Bates on Federal Equity Procedure, in Section 150, says: "It is a well-settled rule of Equity Pleading that nothing can be introduced or inserted in an original bill by way of amendment, which has arisen subsequently to the commencement of the suit; but the plaintiff may amend his bill by introducing any new facts which had occurred at the time the original bill was filed, which he, though apprised of their existence, did not think necessary to be stated or the existence of which he has discovered since the commencement of the suit. The reason of the rule is that amendments, when allowed, are always considered as incorporated in and as forming part of the original bill; the amendments and the original bill constitute one record; the amendments, in contemplation of law, bear the same date as the original, and relate to facts which existed when the original bill was filed; and it would be inconsistent, incongruous and irregular to introduce by amendments any facts which have occurred since the filing of the original bill. Matters which arise subsequently to the filing of the original bill should be introduced by supplemental bill."

Citing:

1 Daniel, 508, 509, 510; 1 Smith's Ch. Pr., 293; Stafford *v.* Howlett, 1 Paige Ch., 200; Hurd *v.* Everett, 1 Paige Ch., 124.

It follows that the two amended bills were allowed by the lower Court in error, and to great prejudice of the defendants, specially as the amendments were allowed after issue joined and the last amended bill of complaint was allowed after the testimony has been in, and the defendants in this way were deprived of much valuable testimony which they could have offered under a supplemental bill and were thereby prevented from having a fair trial of their case.

Disregarding then the amendments erroneously allowed by the Court, it follows that under the original bill of complaint the complainant had no capacity or right to sue.

FOURTH POINT.

Under the civil law a woman divorced for her adultery has no right of action for any share in the marriage community assets.

Article 73 of the Civil Code in force in Cuba, Porto Rico and the Philippines, contains the following:

"A decree of divorce shall produce the following effects:

1. The separation of the spouses.

5. The retention by the innocent husband of the administration, if he should have it, of the property of the wife, who shall only be entitled to support."

Spanish Civil Code.

Article 1434. After the separation of property has been ordered the conjugal partnership shall be dissolved, and its liquidation shall be made according to the provisions of this code. Never the less

the husband and wife shall mutually attend to their support during the separation and to the support of the children, as well as to their education, each one in proportion to his or her respective means.

The French Civil Code in Article 299, says:

"Pour quelque cause que le divorce ait lieu, hors le cas du consentiment mutuel l'epoux contre lequel le divorce aura ete admis, perdera tous les avantages que l'autre epoux lui avait faits, soit par leur contrat de marriage, soit depuis le marriage contracte."

Translated into English:

"For whatever cause the divorce take place, except for cause of mutual consent, the spouse against whom the divorce was decreed shall lose all the advantages which were made in his favor by the other spouse, be it through their marriage contract or be it after the marriage contract."

Ballinger on Community Property, Section 5, page 6, says as follows: "The wife forfeits her matrimonial gains when she has been guilty of adultery or abandons her husband without his consent."

Citing Schmidt's Civil Law, Art. 68; L. 5 and 11, t. 9, I. 5 Rec.; I. 5 and 11, t. 4, I. 10., Nov. Rec.

Article 1433 of the Civil Code, says as follows:

"The husband and the wife may request the separation of the property, and it shall be decreed, whenever the spouse of the plaintiff should have been condemned to a penalty which includes Civil Interdiction, or should have been declared an absentee, or should have given cause for divorce. In order that the separation may be decreed, it shall be sufficient to present the final judgment rendered against the guilty or absent spouse in each one of the three cases above mentioned."

It will be seen from this article clearly that only the innocent spouse has a right or action against the guilty party, if he wishes to use that right, for liquidation of the marriage community property, but never has the guilty party any such right or action. Even in case the guilty party has any separate property administered during the matrimony, by the husband, she is not entitled to it, but is only entitled to support, as seen from Article 73 of the Civil Code cited above.

Q. Mucius Scaevola in the commentaries upon the Civil Code, which are now being published in Spain and which are considered the greatest authority upon the Civil Code, in Volume 22, of said commentaries, in the chapter which treats of conjugal partnership and its incidents, maintains on page 374 and 375 of that volume the same view and gives to the cited articles of the Civil Code the construction we have given them.

FIFTH POINT.

In the liquidation of the marriage copartnership assets the legitimate expenses made by the husband during the duration of the marriage, no matter how large they were, cannot be charged against his share.

Article 59 of the Civil Code contains the following: "The husband is the administrator of the property of the conjugal partnership except when the contrary is stipulated and in the case of article 1384."

Article 1384, treating of parafernalia, is as follows: "The wife shall have the management of the paraphernal property unless she has delivered

the same to her husband before a notary in order that he may administer said property. In such case the husband is obliged to create a mortgage for the value of the personal property he may receive, or to secure said property in the manner established for dowry property."

Article 1408 of the Civil Code contains the following:

"The conjugal partnership shall be liable for:

1. For the debts and obligations contracted during the marriage by the husband, and also for those contracted by the wife in the cases in which she can legally bind the partnership.

5. The support of the family and the education of the children in common, and of the legitimate children of one of the spouses only."

Article 1413 contains the following: "Besides the powers the husband has as administrator, he may alienate and encumber for a valuable consideration the property of the conjugal partnership without the consent of the wife."

The French Civil Code, Article 1421, says:

"Le mari administre seul les biens de la communaute. Il peut les ventre, aliener et hypothequer sans le concours de la femme."

Translated into English:

"The husband is the sole administrator of the community property. He may sell, alienate and mortgage it without the concours of his wife."

Article 1409 of the same Code Civil says:

"La communaute se compose passivement, * * * 5, des alimments des époux, de l'education et entretien des enfants, et de toute autre charge du mariage."

Translated into English:

The passive or debit of the community is composed: * * * 5th, of the maintenance of the spouses, of the education and maintenance of the children and of all other expenses of the spouses."

It will be seen from these articles that the power of the husband to administer and to spend for the support of the family according to the necessities and according to his judgment is actually unlimited. If he is wealthy he may make any expense he deems proper for himself or for the family as large as it may be.

In the case of Claus Spreckles and wife *v.* Rudolph Spreckles (116 Cal., 339) Justice Temple, delivering the opinion of the Supreme Court of California, among other things, says:

"The marital community was not organized for the purpose of accumulating property, and the husband owes no duty to the community, or to the wife either, to labor or accumulate money, or to save or practice economy to that end. He owes his wife and children suitable maintenance, and if he has sufficient income from his separate estate for that purpose he need not engage in business or so live that there can be community property. If he earns more than is sufficient for such maintenance he violates no legal obligation if he spends the surplus in extravagance or gives it away. The community property may be lost in visionary schemes or in mere whims. Within the law he may live his life, although the community estate is dissipated. Of course I am not speaking of his moral obligations. We derived the system of community estate from the Mexican law, which prevailed here before the acquisition of the territory. The system was unknown to the common law, and it has no better name for the interest of the wife during the marriage than "a mere expectancy." The Mexican jurists spoke of it as a feigned and fictitious ownership or as merely nominal, and it is contrasted with the ownership of the husband.

That is called the actual or true ownership. In Panaud *v.* Jones, 1 Cal., 488, it is said: "The wife," says Febrero (1 Feb. Mej., 225, § 19), "is clothed with the revocable and feigned dominion and possession of one half of the property acquired by her and her husband during the marriage, but after his death it is transferred to her effectively and irrevocably. * * * The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the *gananciales*, since even during the marriage he has, in effect, the irrevocable dominion," &c.

In Van Maren *v.* Johnson, 15 Cal., 308, it is said that the estate of the common property is in the husband, and he may dispose of it as he can of his separate estate, the interest of the wife being a mere expectancy. Guice *v.* Lawrence, 2 La. Ann., 226, is cited as as authority. In Packard *v.* Arellanes, 17 Cal., 525, that case is again cited as authority, in which it is said that during the life of the husband the wife cannot say she has gananciales—that is, community property—but the husband during her marriage, is "real y verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable," where, too, the interest of the wife was said to be revocable and fictitious. In Escriche, under "Bienes Gananciales," it is said that the husband owns the community property both nominally and in fact—en habito y en acto—while the wife's ownership is only nominal—en habito—becoming an actual estate upon the dissolution of the marriage. In Ballinger on Community Property the Mexican law is stated as above; the wife had only a feigned or fictitious estate which ripened into a legal estate upon the termination of the marriage; and he adds, referring to the state of things under the former statute of this State, which provided that upon the death of the wife prior to the death of the husband one-half of the community property should go to her heirs, that, since the statute failed

to provide that upon the death of the wife one-half should go to her estate, her intangible interest did not ripen into a legal estate (§ 35). Accordingly it was held in Packard *v.* Arellanes that under such circumstances the interest of the wife could not be administered upon, and that her heirs did not acquire the estate by inheritance from her upon her death before her husband, but took as persons designated by the statute. Speaking of the wife's interest, it is there said: "Such interest constitutes neither a legal nor an equitable estate, as there is, therefore, nothing in it for a court of probate to act upon. If, under the statute, the title of the husband, upon the death of the wife, is divested as to any portion of the property, such title passes directly to the descendants of the wife, and they take it subject to the liability of the property to be absorbed in the payment of debts."

As the law stood prior to the amendment of 1891, I doubt if a happier phrase could have been devised to express the interest of the wife in the community than that used by Judge Field in Van Maren *v.* Johnson, "a mere expectancy." It may be said to be a right—not to property, but as against the community—to take one-half of the residue after payment of debts in case the marriage be dissolved during her life. A somewhat similar state of things exists in France under the Code, and it has been there said that the wife is not "*proprie socia, sed speratur fore.*" She has "*une simple esperance*" to share in such property as may be found at the dissolution of the community undisposed of by the husband" (I. Bourge, Colonial Laws, 368) The system of the community in California, Louisiana and Texas was inherited from Spain or Mexico, and simply continued with such changes as were deemed desirable. It was adopted in Washington, Nevada, Idaho and Arizona."

Ballinger on Community Property, in Section 79, says as follows:

"The law, in establishing between the spouses a *quasi*-partnership as to acquests and gains, recognized the necessity of merging the powers usually incident to both members of a commercial partnership in one of them, so that the business management thereof might be simply, speedily and effectively administered. The husband, being the natural head of the family, is recognized by the law as the proper person in whom should be reposed the management, control and disposition of the community effects for the benefit of the community. He is thus treated as the active partner, or sole business agent, of the marital establishment. Under the Spanish law he was given the exclusive administration of all the ganancail property, and could hypocate or alienate it untrammeled by any authority existing in the wife. The only restriction upon his power of disposition, or even of dissipating it, was that the alienation must not be made maliciously or in fraudulent diminution of the gananeias. The law in making the rights of the wife as to administration passive merely, presupposes the capacity and prudence of the husband and its active agent, and at the same time is designed to preserve domestic harmony. Where the husband, however, is insane or incarcerated for any considerable period, or has abandoned the wife, the reason of the rule which invests him with the active administration of the ganancias ceases, and the wife should in such cases be considered as substituted in his stead as the active partner."

The law of Porto Rico goes so far as to authorize the husband to gamble with the earnings of the marriage community property. Article 1411 of the Civil Code reads as follows:

"What has been lost and paid for during marriage by either of the spouses, in any kind of game

whatsoever, shall not diminish his or her respective share in the partnership."

In Q. Mucius Scaevola Commentaries on the Civil Code we read as follows, translating from the Spanish original:

"As it is necessary that one should manage a partnership, this faculty has been given in the conjugal partnership to the husband. It is so provided first in article 59 of the Code and then with reference to the marriage community profits in article 1412. The husband is not called director, but administrator, because it treats of the management of goods and property. But as his administration cannot be like that of an agent, because among the economical means which are confided to him there are some which are his own and in which he has the imminent power to act as owner, it is necessary to define the limits of the faculties which belong to him. After having exposed this in respect to the dowry and the paraphernalia, the present section will fix the faculties in reference to the marriage community property. We will limit ourselves to anticipate the cardinal points to which the administration of the husband is subject. As a typical point we mention that of not keeping or rendering accounts, with the exception of the time of the dissolution of the marriage, which accounts are certainly not like those of ordinary administrator, as no charges ought to be made against the husband, in any case, of the infinity of small expenses even made at his simple caprice, provided they were of the current and natural order in the administration which any person of average diligence would make" (Mucius Scaevola Commentaries, Volume 22, p. 313).

We quote further from the same Commentaries, Volume 22, pages 319 and 320: "In many articles of these commentaries we have defined what administration means. But we have to add that the administration of the marriage community property

conferred upon the husband is more ample than any administration admitted by the Code, as it begins as before said with the power of direction and resolution of all questions and goes up to that of contracting and making effective in accordance with his own criterium the obligations which he may or ought to satisfy, debiting them to the administration; the husband may rent or not the properties, may cultivate them or not, may borrow money with guarantee if he thinks necessary, may dispose unlimited the expenses of repairs, may invest money in the obligation established in 1408, distributing it more or less amply according to his own designs, and as we saw may even gamble and lose and pay with the profits, having of all that the legal sanction.

As long as he does not forget to decorously maintain the family and to attend to the necessary repairs of the property in the terms established by Article 1408, and as long at he does not alienate the community property or its fruits fraudulently against the interest of the wife, according to the disposition of Article 1413, the powers of the husband are nothing less than absolute. Article 1412 does not say where there is the limit of the power of the husband, in reference to the administration. But the disposition of Article 1413 is general as to administration and to alienation and, its doctrine may be reduced to one general principle; the husband may do everything that he pleases, alieniating, incumbering and simply managing the community property and its profits, as long as his acts are not inspired by the intent to defraud his wife."

After what we have shown to be the law correctly interpreted, we may say that the conclusions of the Court below in the case at bar and the decree thereunder are greatly erroneous, as the following observations will show: While explaining why the property did not have a great increase during the marriage on account of his long yeared sickness, and inability therefore to attend to it, defendant Garrozi,

the husband of the complainant, in his testimony said that during the sixteen years of his married life with the complainant from 1886 to 1902, he was obliged on account of his sickness, which at times was very grave, and while he was in danger of dying, to make several trips to Europe, some of which trips have lasted many months and some even years, being all the time under the care of physicians and nurses, and traveling from place to place according to the directions of his physician. There was no other testimony offered or given, neither to prove or disprove or contradict this testimony. Taking this testimony as a basis, the Master and the Court make the following observations (see Report of Special Master, finding numbered 24):

"That said defendant, Garrozi, made several trips to Europe during the continuance of his marital partnership and spent large sums of money by reason thereof, which were, as near as can be determined from his testimony, the following amounts: In 1899, $10,000; in 1890, $7,000; 1895, $5,000; in 1896-98, $25,000; total, $47,000. Said defendant claims in his testimony that these trips to Europe and the expenditure of these large sums of money was rendered necessary by reason of his serious and continued illness.

But said testimony is not substantiated by that of any other credible witness, while, if true, it could have been easily proven by the testimony of some of the physicians who attended him, and who must have had full knowledge of his condition during these times. But even granting that the journeys were necessary to defendant's health, the Master is forced to the conclusion, either that said defendant has exaggerated the amounts expended, or that such extravagant expenditures were not either necessary or reasonable, and hence not a proper charge against the property of the marital partnership. It seems that twenty-five thousand dollars would have been a liberal expenditure under the circumstances for a

man in defendant Garrozi's condition of life, and the Master therefore concludes that twenty-two thousand dollars of the amount be charged against the separate property of defendant Garrozi" (Record, p. 83).

Further, the Master and the Court make the following conclusion of law (Record, p. 84):

"That in the case at bar the complainant having brought no assets to the marital partnership, and the defendant Garrozi having brought property to the value of seventy-one thousand five hundred dollars, and the total assets of the partnership at the date of its dissolution having been found to be $77,000, there would remain as the profits of said partnership the sum of $5,500, of which the complainant would be entitled to one-half or $2,750; but the defendant Garrozi having, as herein found, wrongfully deprived the partnership of the sum of $22,000, the complainant will be also entitled to recover from the defendant Garrozi one-half of the amount, or $11,000, making a total of $13,750, to which the complainant is entitled" (Record, p. 84).

The Court below confirmed the Master's report and made this conclusion of law its own, saying that twenty-two thousand dollars should be charged against the husband on account of the above mentioned legitimate expenses for trips to Europe, physicians and other expenses made in order to cure himself by Garrozi during the eighteen years of his married life with the complainant; and therefore the Court added to the $2,750, found as the amount of profits of the marriage copartnership corresponding to the share of the complainant (Record, p. 84), other $11,000, that is to say, half of the above mentioned $22,000, and gives the wife instead of the $2,750 found by the Court as her share of the marriage community profits, the amount of $13,750.

The reasoning of the Court below is evidently fallacious. We should logically reason as follows: If the husband's testimony is true, then there is nothing to charge against him, as he legitimately spent the whole sum of $47,000 in curing himself from long and grave illness. In case this testimony is not true, then he did not spend that amount and therefore no such amount was ever taken from the marriage community partnership property, and therefore there is nothing to charge against him either. This one is the logical conclusion and not the conclusion of the Court below.

SIXTH POINT.

At the liquidation of the marriage community partnership only an aliquot share of the property may be adjudged to each of the spouses, but no money judgment can be given in favor of one against the other.

Article 1428 of the Civil Code provides as follows: "With regard to making the inventory, rules for the appraisal and sale of the property belonging to the conjugal partnership, guarantee and security for the respective doweries, and all other particulars, not expressly fixed in this chapter, the prescriptions of Section 5th, Title 3d, Book 3d, and Sections 2d and 3d, Chapter 3d of these titles shall be observed."

Among the prescriptions of the sections referred to and mentioned in the article just quoted we find the following articles:

Article 1367. The real property of the unappraised dowery shall be restored in the condition in which it may be; and should it have been alienated, the proceeds of the sale shall be delivered, deducting

what may have been applied to the payment of the exclusive obligations of the wife.

Article 1030. If for the payment of credits and legacies the sale of the hereditary estate should be necessary, it shall take place in the manner established by the law of Civil Procedure with regard to intestate and testamentary proceedings, unless all the heirs, creditors and legatees come to a different agreement.

There is no provision neither in the articles quoted nor in any of the sections referred to in Article 1428, which would authorize a money judgment against the husband. The property is to be divided in proportionate shares, and only in case that for the payment of credits and legacies the sale of the estate should be necessary, then a sale may take place and the money realized may then be divided in the proportionate shares between the spouses.

The reason is obvious. If a money judgment be given to one of the spouses before the conversion of the property in money, then it may result that the other spouse may not be able to realize by the sale of the whole property the amount adjudged to be paid. No such injustice could be contemplated by any code of laws. The decree of the lower Court for a specified sum of money is therefore erroneous.

The French Code Civil in Article 1476 says as follows:

" Au surplus, le partage de la communaute, pour tout ce que concerne ses formes, la licitation des immeubles quand il y a lieu, les effets de partage, la garntie qui en resulte, et les soults est soumis a toutes les regles qui son etablies au titre des successions pour les partages entre coheritiers."

Translated into English:

" Besides, the division of the community property, so far as concerns its forms, the auction sale of the real estate in case such should take place,

execution of the division, the guaranty resulting thereby, and the payments, is subject to all the rules which are established in the Title of SUCCESSIONS for the division between coheirs."

Article 826 on division of SUCCESSIONS says:

2. CHACUN DES COHERITIERS PEUT DEMANDER SA PART EN NATURE des meubles et immeubles de la succession: neanmoins, s'il y a descreanciers saisissants ou opposants, ou si la majorite des coheritiers juge la vente necessaire pour l' acquit des dettes et charges de la succession, les meubles son vendu publiquement en la forme ordinaire.

Translated into English:

" Each one of the heirs may demand his part in kind, personal or real estate of the succession: nevertheless, in case there are creditors attaching or opposing, or in case the majority of the heirs consider the sale necessary for the payment of debts or charges as against the estate, the personal estate may be sold at public auction in the ordinary form."

SEVENTH POINT.

Counsel fee and suit money cannot be given in a suit for liquidation of her share of property by a divorced wife after divorce; and in the courts of the United States counsel fee can never exceed the sum of twenty dollars.

Ballinger on Community Property, Section 119, note, says:

That no charge can be made against the community property " for fees of counsel employed by

the wife to prosecute a suit for divorce and partition of community property" (citing Tucker *v.* Corlin, 14 An., 734).

In Section 215 of the same book we read as follows:

"It was held in Drais *v.* Hogan, 50 Cal., 121, that a married woman could not bind herself by a contract to pay an attorney for procuring a divorce and a division of the community property. Whether the services rendered by an attorney for a married woman in procuring a divorce and securing her a first division of the common property, may be enforced in a court of equity as a lien on her share of the common personal property or her separate personal estate, provided the services were rendered on the face of her personal separate estate, was suggested but not decided in Terry *v.* Hammond, 47 Cal., 32. There is no provision of law authorizing the Court to require the husband to pay, subsequent to the divorce and out of his separate property, any sum toward the maintenance of the former wife, when the divorce was for her offense."

The United States Revised Statutes, Section 823, expressly provide that twenty dollars as an attorney's fee, and no other compensation shall be given to the party prevailing. This section has been construed as a restriction upon the United States courts in order to make the costs in all United States courts uniform.

Says Justice Webb, in Celluloid Manuf'g Co. *v.* Chandler, 25 Fed. Rep., 9: "This Act of February 26, 1853, substituted, in all the Federal Courts, for the State practice, its own provisions. Before its passage, the costs, though made to conform to the allowance for the same items in the courts of the respective States, were distinctly taxed and allowed in favor of parties obtaining judgment. Act 1793, Ch. 20, § 4. That to secure this uniform rule, was the object of the statute is plain, and there is no reason

to conclude there was a further purpose to change the party in whose favor the allowance was made."

Mr. Justice Nelson, in Troy Iron & Nail Factory *v.* Erastus Corning, 7 Blatch., 16, says: "The section goes on to say, 'Fees of attorneys, solicitors and proctors. In a trial before a jury in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars.' This is the highest compensation allowed to the solicitor in a cause; and it can be allowed but once. Dedekam *v.* Vose (Cases Nos. 3730, 3731)."

Goodyear *v.* Sawyer, 17 Fed., 13.
Williams *v.* Morrison, 32 Fed., 683.
Cleaver *v.* Traders' Insurance Company, 40 Fed , 864.
Parks *v.* Booth, 102 U. S., 96.

Even in State courts when alimony or counsel fee or suit money are given, it is only in cases when the complainant is still the wife of the defendant, but in no case such counsel fee or suit money is given after the divorce in a suit for her share of property. There is no statute in Porto Rico authorizing anything of this kind, and no such local statute could override the express provision of the law of Congress as far as the United States courts are concerned.

In the case at bar it can be seen from the record that the judgment of the District Court of Ponce denying the divorce prayed by the husband, Garrozi, and granting alimony and suit money to the wife, who is the complainant in this case, was reversed by the Supreme Court of Porto Rico, which Court granted the divorce to the husband Garrozi from the complainant in this case. It follows that the alimony, suit money and costs which were given to the wife in the lower local Court, that is to say, the District Court of Ponce, now, after the judgment of said District Court has been reversed

by the Supreme Court of Porto Rico, cannot be collected at all, and certainly not in these proceedings for the liquidation of the marriage community. Besides, the decree of the lower Court, that is to say, the United States District Court for Porto Rico, finding that the profits of the marriage community, after deducting all charges, were $5,500, is conclusive, and the Court cannot after decree entered, without showing error in computation, afterwards give to the complainant more as suit money.

The Court below therefore erred in adding to the decree the sum of $598, with $133.50 interest thereon as suit money given by the Ponce local Court and also $885 alimony given by that lower Court, the judgment of which was reversed by the Supreme Court of Porto Rico. The lower Court also erred in giving the complainant in the case at bar a counsel fee exceeding the statutory twenty dollars docket fee, to wit, the sum of $1,500.

In the case of Barber *v.* Barber, 21 Howard, 582, it was held that although alimony given by a divorce court may be sued for in a court of the United States, no such Federal court has jurisdiction to grant any alimony, suit money or counsel fee.

EIGHTH POINT.

Fraud will never be presumed, and the fact that the husband two years before the divorce and long before the divorce proceedings have been commenced by him has sold property to the value of seventy-seven thousand dollars while the share of his wife amounts to the paltry sum of twenty-seven hundred and fifty dol-

lars cannot warrant a conclusion that the sales were fraudulently made in order to deprive the wife of her share.

From the findings of fact by the Court below it can be seen that the property transferred by the husband Garrozi to the other defendants amounts in value to the sum of $77,000 (Record, p. 84).

It can also be seen that the marriage community property profits amounted to $5,500 (Record, p. 84), and that the wife's share amounts to the sum of $2,750 (Record, p. 84). Now it is inconceivable that a sane man should transfer such a big amount of property in order to avoid the payment of a paltry sum, which at the time of the transfers he was not even in expectation ever to owe to his wife.

It is almost unnecessary to repeat well-known maxims of equity: "Fraus est odiosa et non praesumenda." "Odiosa et inhonesta non sunt in lege praesumenda."

Hager *v.* Thompson, 1 Black (66 U. S.), p. 80.
Clarke *v.* Hackett, 1 Black (66 U. S.), p. 77.
Collins *v.* Thompson, 22 How., 245.
Connor *v.* Featherstone, 12 Wheaton, 199.
Garner *v.* Nichols, 9 How., 356.

It is a rule of law that subsequent creditors cannot have any right to set aside previously made transfers of property, because this would upset all business transactions. It is only allowed in exceptional cases when it is shown that when the conveyances were made, the grantor was insolvent and continues so, or is very deeply in debt. A small indebtedness will not suffice. The proportion of the debt to the value of the conveyances will be considered, and only in a case of clear and un-

doubted fraud upon creditors may previous sales be allowed to be attacked by subsequent creditors.

Graham *v.* La Crosse & M. R. R. Co., 102 U. S., 148.
Moore *v.* Page, 11 U. S., 117.
Schreyer *v.* Scott, 134 U. S., 405.
Sexton *v.* Wheaton, 8 Wheaton, 229.
Mattingly *v.* Nye, 8 Wall., 370.
Hinde *v.* Langworth, 11 Wheaton, 199.
Kehr *v.* Smith, 20 Wall., 31.
Smith *v.* Vodges, 92 U. S., 183.
Jones *v.* Clifton, 101 U. S., 225.
Clark *v.* Killian, 103 U. S., 260.
Horbach *v.* Hill, 112 U. S., 144.

In the case at bar there is no proof that the defendant Garrozi was insolvent at the time his conveyances were made. The subsequently accruing debt of some temporary alimony incidental to subsequent divorce proceeding instituted by himself, not against him, is immensely small and insignificant as to allow any doubt or suspicion of fraud, the conveyances being made for valuable considerations, against which no evidence was offered by the complainant.

NINTH POINT.

The findings of fact by the Court below are based on hearsay testimony and on opinion of witnesses who have not qualified as experts on the value of agricultural estates, to appraise which it requires certain knowledge and experience, while at the same time material and competent testimony offered by the defendants was wrongfully excluded by the Court.

The errors in the rulings of the Court below on the evidence are exceedingly numerous. They are in-

cluded in the assignment of errors from No. 12 to No. 31, and from No. 36 to No. 39 inclusive. The exceptions taken by the defendants to these rulings of the Court are on record in the bill of exceptions and speak for themselves (Record, pp. 114 to 123).

It will require only a slight examination of those rulings on the testimony for this Court without any argument to perceive the errors committed by the Court below in that respect. It will then become manifest that the findings of fact of that Court want any and all basis in the evidence, and could not stand the scrutiny of this Court.

We will consider the errors in the rulings of the Court below upon the evidence under four different heads: first, permitting hearsay testimony; second, permitting testimony of facts too remote from the issues; third, permitting witnesses who did not qualify as experts to testify as to their opinion on the matters in issue; and, fourth, refusing competent testimony offered by the defendants.

(*A.*)

THE COURT BELOW HAS PERMITTED WITNESSES TO GIVE HEARSAY TESTIMONY AGAINST THE OBJECTION OF THE DEFENDANTS.

On the cross-examination by defendant's counsel of complainant's witness Juan Macini Pietri (Record, p. 114) the following question was asked: "So then it was not by judging the amount of the crop that you gave the value, and it was not by the extent of the land? Your estimate, then, was based simply on what other people said?" in order to show that the witness' testimony was only hearsay. The objection of complainant's counsel to this question was sustained by the Court, to which ruling the defendants excepted.

Afterwards the same witness had given the following answer to defendant's questions: Q. "You have testified something about the planta-

tions 'Luisa' and 'Leonor.' What do you know about those farms?" Ans. "I have testified that the plantation 'Luisa' produces a yearly average of 500 quintals, and the plantation 'Lenor' about 300 quintals." Q. "How do you know that? Have you been managing these plantations?" Ans. "I know it by what is said." Q. "That is all you know about it?" Ans. "Yes" (Record, p. 114). The motion of defendants to strike all the testimony of this witness referring to the plantations "Leonor" and "Luisa" as being simply hearsay was overruled, to which ruling the defendants excepted. Now the above named plantations "Luisa" and "Leonor" form the chief and principal part of the property in issue, and the value of them, which had to serve as a basis for the calculations of the liquidation of the marriage community property, was ascertained by the Court by such hearsay testimony as the above quoted.

(*B.*)

THE COURT BELOW ALLOWED WITNESSES, WHO HAVE NOT QUALIFIED AS EXPERTS, TO GIVE THEIR OPINIONS AS TO THE VALUE OF AGRICULTURAL PROPERTY, WHICH REQUIRES SPECIAL AND EXPERT KNOWLEDGE.

On the direct-examination of complainant's witness, Jorge Massenden, the following question was asked by complainant's counsel (Record, p. 114): "What was the value of the plantation 'Juanita' before he was married in 1886?" Defendants objected on the ground that the witness had not qualified as an expert, as is shown by the questions given to the witness before that question. The Court overruled the objection.

The testimony of the witness was as follows: Q. What is your name? Ans. Jorge Massenden. Q. How long have you lived in Yauco? Ans. For thirty odd years. Q. How long have you known Garrozi? Ans. From the year 1882. Q. Did you

know him before that time? Ans. No. Q. What was his occupation in 1882? Ans. He was in the "Juanita." Q. Was that his property? Ans. At that time it was his property. Q. What other property did he have in Yauco in the year 1882? Ans. In 1882 I knew only this property, and in 1883 I knew Mr. Garrozi had a house in Rosario street, Yauco. Q. Besides that house, what other property did he have in 1883? Ans. I do not know what other property he had. Q. Did he have any other? Ans. In a few years he bought a store. Q. In what year was that? Ans. I cannot state accurately. Q. What property did he have in 1886, before he married? Ans. Those three only. Q. What was his house worth at that time? Ans. At that time it might have been worth about $1,500. Q. You mean in the current money of Porto Rico? Ans. No, in gold. Q. What was the value of the house in current money at that time? Ans. $200 pesos Mexican. Q. What was the value at that time of the other property he had in Yauco? Ans. It had a value of $600 pesos before the second story was built, in the same Mexican currency. Q. When was the second story built? Ans. After the year 1886. Q. After his marriage? Ans. Yes. Q. What was the value of the plantation "Juanita" before he was married in 1886? Defendants objected on the ground that the witness had not qualified as an expert. The Court overruled the objection, to which ruling the defendants excepted.

Ans. This plantation "Juanita" had a positive value of $25,000 pesos cash (Record, p. 114).

The same witness was asked by complainant's counsel: "How wealthy is he (meaning Garrozi today)?" Defendants objected to this question as being incompetent, and calling for an opinion only. The Court overruled the objection, to which ruling the defendants excepted. A motion to strike out the answer to the foregoing question, which was as follows: "He must have at least $150,000," on the ground that it was an opinion of the witness, was

overruled, to which ruling the defendants excepted (Record, p. 115).

The complainant's witness, Gustavo Nin, was asked as follows on his direct-examination by the complainant (Record, p. 116): Q. What is your name? Ans. Gustavo Nin. Q. Where do you live? Ans. In Yauco. Q. How long have you lived there? Ans. I was born there. Q. Do you know Tomás Garrozi? Ans. Yes. Q. How long have you known him? Ans. Since he came to Porto Rico. Q. Do you know his father? Ans. I knew him when I was a boy. Q. Have you had any business with Garrozi? Ans. Yes. Q. Before his marriage? Ans. No, but afterwards. Q. Before his marriage what property did he have? Ans. A coffee plantation, a wooden house in Yauco and two masonry houses there. Q. What plantation was that? Ans. The "Juanita," the one belonging to Pintado now. Q. What was this plantation worth before his marriage?

Defendants objected on the ground that the witness had not qualified as an expert. The objection was overruled by the Court, to which ruling the defendants excepted.

Ans. About $20,000.

The same witness was asked the following question: "You base your calculation on the price you heard Mr. Pintado paid for it, do you"? Ans. Yes. He gave it to Pintado in liquidation for $45,000.

The defendant's motion to strike out this witness' testimony as to valuation was overruled, to which ruling the defendants excepted.

The testimony of the complainant's witness Manuel Catalá Dueño (Record, p. 118) was as follows: Q. What is your name? Ans. Manuel Catalá Dueño. Q. What is your occupation? Ans. Judicial agent. Q. Do you live in Yauco? Ans. Yes, for twenty-one years. Q. When did you move to Yauco? Ans. In the year 1881. Q. Do you know Garrozi? Ans. Yes. Q. Since when? Ans. Since my arrival in Yauco. Q. Do you know his prop-

erty interests and business? Ans. Yes. Q. Have you been his agent on different occasions? Ans. I acted as his agent on one occasion. I was employed by him to take some accounts at his house. Q. As such agent and by reason of such employment have you had opportunity to know his financial standing and become familiar with his interests? Ans. To a great extent. Q. When was Mr. Garozzi married, do you remember? Ans. In the month of May, 1886. Q. Before that time what part did you take in his property interest? Ans. I took no interest in his property interests, but as a protocol clerk of the notary at Yauco I intervened in the documents executed by him at Yauco. Q. And you had opportunity to see the title deeds that he had before his marriage? Ans. Yes. Q. What properties did he have before his marriage?

Mr. Boerman: I object, as the question calls for an answer that is not the best evidence and is simply hearsay. There are writings in existence showing these properties.

Ans. He owned an estate in the barrio of Aguas Blancas.

Q. What was that estate?

Ans. It was a coffee hacienda called "Juanita," which he had turned over to Isidoro Pintado to have it liquidated, and after being liquidated for the price put upon it, the property then belonged to both of them.

Q. Did you see the title deeds to that property?

Ans. I have seen them many times, and I have had opportunities of taking copies from it and drawing instruments in regard to the same matter. He had besides a house; I do not remember the name of the street; besides that he had a masonry house and another wooden house next to the first one where they had a cock-pit; he had besides a mortgage credit on the estate "Restaurado" belonging to Juan Antonio Negrón for the amount of 10,000 pesos or more.

Q. Did you see the title deeds to these properties?

Mr. Boerman: I object to it as hearsay and secondary and not the best evidence.

Q. Have you had in your hand and had occasion to read the title deed to these properties?

Mr. Boerman: I object to this class of evidence, as it is incompetent, is purely hearsay and secondary.

Ans. I had an opportunity of seeing the titles referring to the plantation "Juanita," and of the house of masonry in Rosario street, and the title of the mortgage on the plantation "Restaurado," but as to the others, I have not seen them.

Q. As to what you have not seen?

Ans. The house where the cock-pit was, and Mr. Garrozi had besides two masonry houses in Borinquen street, masonry buildings, on one of which a second story was added.

Q. In what notarial office were you in Yauco?

Ans. In the only one then existing, that of Don Juan Zacharaias Rodriguez.

Q. Were there any more title deeds in that office of properties of Mr. Garrozi?

Ans. I do not know. According to the time I was there, there were no more.

Q. What time were you there?

Ans. From 1881 to 1884 and 1885.

Q. If there had been any other title deeds would you have seen them?

Ans. Yes.

Q. What was the value of the plantation "Juanita" from the year 1881 to 1885?

Ans. The plantation "Juanita" in the year 1881 had a value of 40,000 pesos, because this was the value they agreed upon when the transaction of the partnership was made.

Q. Was that a cash value or time payments?

Ans. It was not a cash value as it was agreed upon as the price to be paid in a certain number of years.

It was what was due on it.

Q. In how many years? Ans. In ten years.

Q. What was the value of the plantation "Juanita" in cash at that time?

Ans. In my judgment from 20 to 25,000 pesos.

Q. Why? Ans. For the reason that its value had to be paid in a number of years. The sale was by installments.

Q. What was the value of the cock-pit?

Ans. The cock-pit may have been worth from 6 to 800 pesos.

Q. How do you know it?

Ans. Because, if I remember rightly, Mr. Garrozi sold the house at this price to Mr. Antonio Franceschi.

Q. What was the value of the two other masonry houses?

Ans. From four to five thousand pesos.

Q. How do you know it?

Ans. This was the assessment for the collection of the taxes, and it was made at this price, because later on when Mr. Garrozi transferred these houses to Maria Gonzalez, one of them had been reconstructed, making a two-story house of it, and he did it for the sum of six thousand pesos.

Q. What was the value of the other property he had?

Ans. The house located in the street whose name I do not remember, was worth six hundred pesos. (Record, p. 120).

Q. What was the value of the plantation "Juanita" from the year 1881 to 1885?

Defendants objected on the ground that the witness did not qualify as an expert. The Court overruled the objection to which ruling the defendants excepted (Record, p. 117).

Ans. The plantation "Juanita" in the year 1881 had a value of 14,000 pesos because this was the value they agreed upon when the transaction of the partnership was made.

Q. What was the value of the plantation "Juanita" in cash at that time?

Defendants objected on the ground that the witness had not qualified as an expert. The Court overruled the objection, to which ruling the defendants excepted (Record, p. 117).

Ans. In my judgment from twenty to twenty-five thousand pesos.

Q. What was the value of the cock-pit?

Defendants objected that the witness had not qualified as an expert. The Court overruled the objection, to which ruling the defendants excepted.

Ans. The cock-pit may have been worth from six to eight hundred pesos.

Q. What was the value of the other wooden house that he had?

Same objection and ruling. Exception.

Ans. Twenty-five hundred pesos (Record, p. 117).

Q. What was the value of the two other masonry houses?

Same objection and ruling. Exception.

Ans. From four to five thousand pesos.

Q. What was the value of the other property he had?

Same objection and ruling. Exception.

Ans. The house located in the street whose name I do not remember was worth six hundred pesos.

Q. How much money in cash?

Ans. As proceeding from the "Juanita" he should have $28,000.

Defendant moved to strike out the answer as being an opinion of the witness, which motion was overruled and the defendants excepted (Record, p. 120).

Witness Francisco Negroni Lucas was asked by complainant the following question (Record, p. 121):

"Q. Has Tomas Garrozi increased his wealth since his marriage in 1886?"

Defendants objected on the ground that it calls for an opinion. The Court overruled the objection, to which ruling the defendants excepted.

"Ans. Yes, after his marriage he increased it."

It can be easily seen from the testimony quoted, which was admitted by the Court against the objection of the defendants, that all of it was based simply upon opinions of the witnesses, and as valuation of agricultural land requires certain knowledge and expert opinions of witnesses who had not qualified as experts in any way whatever should not have been admitted. The importance and vitality of such alleged testimony can be seen upon consideration that the marriage community property had to be first correctly valued, before it could be found whether there are any profits belonging to it, which could be distributed between the spouses, and before we could determine if there is anything at all coming to the complainant as her share of such profits.

(*C.*)

THE COURT BELOW HAD ALLOWED TESTIMONY OF THE VALUE OF THE MARRIAGE COMMUNITY PROPERTY AT TIMES TOO REMOTE EITHER FROM THE YEAR OF THE MARRIAGE OR FROM THE YEAR OF THE DIVORCE.

AS THE OBJECT OF THE LIQUIDATION OF THE MARRIAGE COMMUNITY IS TO DETERMINE WHETHER THERE ARE ANY PROFITS OR INCREASE OF THE PROPERTY CONTRIBUTED BY THE SPOUSES TO THE MARRIAGE COMMUNITY, THE VALUES OF THE PROPERTY MUST BE TAKEN OF THE DAY OF THE MARRIAGE AND OF THE DAY OF THE DIVORCE.

Witness Juan Macini Pietri was asked the following question by complainant's counsel: "What

is the value of the plantation "Luisa" and "Hortencia" to-day (1904)?

Defendants objected on the ground that it is too remote in time, the divorce having been granted in 1902, and liquidation, under the law, must be made as of the date of the divorce. The Court overruled the objection, to which the defendants excepted (Record, p. 114).

It has been uniformly held by the Supreme Court of Spain that the beginning and the end of the period of the marriage community, which must be taken as the basis for liquidation, are the day of the marriage and the day of the divorce, and no other subsequent dates can be taken into consideration, although the liquidation itself takes place at a period much later than the date of the divorce.

Sentence of the 4th of March, 1867, Jurisprudencia Civil, Vol. 15, page 229.

Sentence of the 21st of February, 1885, Jurisprudencia Civil, Vol. 57, page 267.

Sentence of the 11th of February, 1891, Jurisprudencia Civil, Vol. 69, page 217.

(*I.*)

THE COURT BELOW REFUSED TO ADMIT COMPETENT AND RELEVANT TESTIMONY OF WITNESSES FOR THE DEFENDANT.

The witness Francisco Paoli on behalf of the defendants was asked the following questions by defendant's counsel (Record, p. 122):

Q. "Were you present in the year 1886 at any such inventory" (referring to inventory made at the time of the marriage)? Ans. "Yes." Q. "Do you remember his marriage?" Ans. "Yes." Q. "Was that before or after his marriage?" Ans. "Yes."

Q. "Before or after?" Ans. "Before." Q. "Was it in the beginning of the year?" Ans. "I cannot state exactly whether it was in the beginning of April or of May." Q. "How did you come to be present at that inventory?" Ans. "I had the necessity of going to see Garrozi in order to obtain some money from him, and when I reached the house I found that he was busy in making this inventory with Mr. Luis García, of his properties." Q. "Did you take any part in the making of that inventory?" Ans. "They asked me to take a seat, and I saw that they were making an account in regard to some money." Q. "Did you see what amount of money it was?" Ans. I saw that they counted and put down on a paper 80,000 and some odd dollars, in gold money it was." Q. Did you see that money?" Ans. "Yes." "What did you do then?" Ans. "I was standing there waiting until they finished with that business and then they referred to other properties, such as mortgages, up to the amount of 200,000 pesos, and as I saw it was getting late and that they were busy I retired." Complainant objected to this testimony and made a motion to strike it as hearsay. Said motion was sustained by the Court, to which ruling the defendants excepted.

On cross-examination the same witness was asked by complainant the following question: Q. "Did you count the money?" Ans. "No, sir; Luis García counted it. They were counting it on the table, and when they had finished counting it they made a note of it, and it amounted to 80,000 pesos." Complainant moved to strike this answer, and the Court sustained the motion, to which ruling the defendants excepted.

The same witness was asked the following question on cross examination: Q. "So what you know about that amount is what you have heard Garrozi say about it, is it?" Ans. "Yes, and I also saw the money on the table, and as they counted it I heard them, and they stated the amounts until they

reached the sum of 80,000 pesos, and it was in gold money." Complainant moved to strike this answer, and the Court sustained the motion, to which ruling the defendant's excepted (Rec., p. 123).

Complainant moved to strike the testimony of this witness, and the Court sustained the motion except as to persons present, to which ruling the defendants excepted (Record, p. 123).

The same witness was asked the following questions by complainant: Q. "Did you see the whole inventory?" Ans. "I saw when the inventory amounted to some 200,000 pesos, and then I retired." Q. "How did you know it was for that sum?" Ans. "Because I heard them saying '80,000 dollars in gold,' 90,000 dollars in property'; various mortgages and other credits." The complainant moved to strike this testimony, and the Court sustained the objection, to which ruling the defendant's excepted (Record, p. 123).

As the object of the liquidation of the marriage community property is to determine if there are any profits to be divided among the spouses after paying back to each one of them his or her part brought in at the marriage, and after paying all the debts resting on such community property, it is very important and relevant to the issues to know exactly what amount of property each one of them has contributed, such property being either real or personal, including money. The testimony offered by the complainant as to his capital in cash at the time of the marriage ought not to have been excluded. The counting of the money in the presence of the witness, accompanied by the announcement of the amount, is competent testimony, the announcement of the amounts by the counters being *res gestæ*. The Court therefore erred in ruling out this testimony.

TENTH POINT.

The decree of the Court below in this case and the supplemental order thereto should be reversed.

Respectfully submitted,

CHARLES M. BOERMAN,
Of Counsel for the Defendants.